

July 13, 2009

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

400 Yesler Way, Room 404
Seattle, Washington 98104
Telephone (206) 296-4660
Facsimile (206) 296-1654
Email hearingexaminer@kingcounty.gov

REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E08G0466**

FERNANDO CHAVEZ, LLC
Code Enforcement Appeal

Location: 22646—204th Avenue Southeast

Appellant: **Fernando Chavez, LLC**
25807 Southeast 192nd Street
Maple Valley, Washington 98038
Telephone: (206) 423-3414

King County: Department of Development and Environmental Services (DDes)
represented by **Holly Sawin**
900 Oakesdale Avenue Southwest
Renton, Washington 98055
Telephone: (206) 296-6772
Facsimile: (206) 296-6604

SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal with revised compliance schedule
Department's Final Recommendation:	Deny appeal with revised compliance schedule
Examiner's Decision:	Deny appeal with revised compliance schedule

EXAMINER PROCEEDINGS:

Hearing opened:	May 19, 2009
Hearing closed:	May 19, 2009

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes.
A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. On February 4, 2009, the King County Department of Development and Environmental Services (DDES) issued a Notice and Order to Appellant Fernando S. Chavez, LLC and the “occupant” of premises at 22646 – 204th Avenue Southeast, the site of the subject action. The property in question is located in the unincorporated area just northwest of Maple Valley and is zoned Rural Area-5 (RA-5). The Notice and Order cited the Appellant, the occupant and the property with the following violation of county code:
 - A. Clearing of all vegetation and grading to bare dirt within critical areas (aquatic, wetland and/or associated buffers) and in excess of 7,000 square feet (majority of parcel) and rural clearing limits.

Compliance was required by the Notice and Order to be performed by the scheduling of a permit pre-application meeting by March 11, 2009, and submittal of a complete clearing/grading permit by April 13, 2009.
2. General rural area clearing limits set forth in the county grading code (Chapter 16.82 KCC), particularly KCC 16.82.150 in this case, have been invalidated by the Court of Appeals. On March 3, 2009, the Washington Supreme Court declined to review the Court of Appeals ruling. [*Citizens’ Alliance for Property Rights v. Sims*, Court of Appeals No. 59416-8-I] Given the invalidation, DDES has withdrawn such finding of violation from its Notice and Order.
3. Mr. Chavez on behalf of the LLC filed a timely appeal of the Notice and Order, making the following claims in the appeal, elaborated upon at hearing:
 - A. The property was a methamphetamine house site a number of years ago and was the subject of closure and abatement. The grounds of the property had long been littered with junk, salvage and debris consisting of wrecked vehicles, vehicle parts and rubbish, etc., in great volumes and spread throughout the property, and had the appearance of a junkyard. Such materials had been the subject of code enforcement activity by the county in the past, but abatement of those aspects of the property had not been accomplished.
 - B. Mr. Chavez upon purchasing the property in 2007 cleaned it up and removed hazards, with great effort and expense, and in so doing, removed junked vehicles, a burnt-out mobile home, scrap, garbage and trash, etc., from throughout the entire site, including from its extensive wetland areas (see below). Mr. Chavez notes that his cleanup efforts came after the County did not obtain compliance by the previous property owner for eight years, and contends that it is an injustice for it to require him to obtain permits for his cleanup efforts after its own lack of success in enforcement actions.
4. The majority of the site is encumbered by critical areas consisting of wetlands, some of which include areas of open water. The wetland areas encumber approximately seven acres of the site, leaving less than three acres of dry land.

5. Substantial vegetation clearing and grading was conducted by the Appellant, and/or under his direction as property owner, as a part of the property “clean-up.” Such clearing and grading, which led to a “parked out” condition, resulted in extensive areas of the site being denuded, including areas within defined critical areas and corresponding associated regulatory buffers. There is no disputation of substantial clearing and grading work being conducted in wetland and buffer areas; in any case, the preponderance of the evidence shows substantial critical area and buffer clearing, right up to water’s edge of open waters. The clearing was also conducted significantly in excess of 7,000 square feet of land area (approximately 1/6 acre; the property in question is 9.29 acres in area).
6. There is no permit exception for clearing and grading activity conducted within critical areas. The clearing and grading conducted onsite in critical areas (the aforementioned wetland/open pond/buffer areas) is required to be conducted under the auspices of an approved clearing and grading permit, regardless of amount. Aside from the critical area location issue, the clearing conducted on the property exceeded the general permit threshold of 7,000 square feet of cleared area. [KCC 16.82.050 and .051]
7. No clearing and grading permit was obtained for the subject clearing and grading activity.
8. The Appellant asserts that his “clean-up” of the property was conducted in good faith after years of the site being an eyesore and dumping ground, with the inference being that such good faith efforts should preempt the applicability of any permit requirements.

CONCLUSIONS:

1. Given the invalidation of the pertinent law by the Washington appellate courts, the Examiner shall affirm DDES’s withdrawal of the charge of violation of rural area clearing limits by formally dismissing it from the Notice and Order.
2. While the Appellant’s clean-up activities are in and of themselves quite laudable, indeed admirable; were motivated generally by good intentions; and in many ways improved the junkyard situation of the property, the Examiner finds no preemption provided by law of the permit requirement. While it may seem unduly onerous to require persons conducting remedial clean-up and violation abatement work to obtain clearing and grading permits, the permit requirements simply aren’t waived because of such good motivations.
3. To the extent that the Appellant’s claim of injustice by requiring permits may constitute a claim of inequity, the Examiner has no authority to grant equitable relief based on assertedly improper or unfair administration of the permit process. The Examiner is generally limited to applying law duly enacted by statute, ordinance and rule, or set forth in case law, and has no authority to adjudicate common law issues such as claims in equity. Equity claims would instead have to be brought in a court of general jurisdiction, the Superior Court. [*Chaussee v. Snohomish County*, 38 Wn. App. 630, 689 P.2d 1084 (1984)]
4. As the clearing and grading that were performed are required to be conducted under permits, and no such permits were obtained, the pertinent charge of violation in the Notice and Order is shown to be correct and is therefore sustained. The compliance schedule below shall require the obtainment of the necessary permit(s). (The Notice and Order compliance schedule is adjusted below to reflect the time taken up by the appeal process.)

DECISION:

The Notice and Order finding of violation of rural area clearing limits is **DISMISSED** for the reasons noted above. The remainder of the findings of violation in the Notice and Order are sustained and the Appeal **DENIED**, provided that the **COMPLIANCE SCHEDULE** is **REVISED** as stated in the following order.

ORDER:

1. Request an appointment for a permit pre-application meeting with DDES to be held *by no later than **August 13, 2009***.
2. Submit a complete clearing/grading application to DDES *by no later than **September 14, 2009*** pursuant to the results of the aforementioned pre-application meeting. After submittal, all pertinent timeframes and stated deadlines for required supplementary information submittals, response comments, etc., if any, shall be diligently observed by the Appellant through to permit issuance and obtainment and final inspection approval.
3. DDES is authorized to grant deadline extensions for any of the above requirements if warranted, in DDES's sole judgment, by circumstances beyond the Appellant's diligent effort and control. DDES is also authorized to grant extensions of finalization of the clearing and grading work for seasonal and/or weather reasons (potential for erosion, other environmental damage considerations, etc.).
4. No fines or penalties shall be assessed by DDES against Appellant Fernando Chavez, LLC and/or the property if the above compliance requirements and deadlines are complied with in full (noting the possibility of deadline extension pursuant to the above allowances). However, if the above compliance requirements and deadlines are not complied with in full, DDES may impose penalties as authorized by county code retroactive to the date of this decision.

ORDERED July 13, 2009.

Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding Code Enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE MAY 19, 2009, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT
AND ENVIRONMENTAL SERVICES FILE NO. E08G0466

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Holly Sawin representing the Department; Fernando Chavez representing the Appellant; Doug Perllwitz and Steven Beck

The following Exhibits were offered and entered into the record:

Exhibit No. 1	Department of Development and Environmental Services (DDES) staff report to the Hearing Examiner for E08G0466
Exhibit No. 2	Copy of the Notice & Order issued February 4, 2009
Exhibit No. 3	Copy of the Notice and Statement of Appeal received February 23, 2009
Exhibit No. 4	Copies of codes cited in the Notice & Order
Exhibit No. 5	Copy of email dated April 15, 2009 from Ruby Herron to Holly Sawin regarding Appellant's public disclosure request for color photos in file no. E0101050
Exhibit No. 6A	Photographs of subject property taken by Holly Sawin on April 21, 2009
Exhibit No. 6B	Aerial photograph of subject property annotated to depict location and direction of Exhibit 6A photos
Exhibit No. 7A-C	Aerial photographs of subject property taken in 2007, 2005 and 2002
Exhibit No. 7D	Map depicting Critical Areas Ordinance hydrologic sensitive areas on subject property
Exhibit No. 8	Statutory Warranty Deed recorded July 2, 2007
Exhibit No. 9	<i>not entered</i>
Exhibit No. 10	<i>not entered</i>
Exhibit No. 11	Letters from Fernando Chavez to: Holly Sawin dated December 12, 2008, DDES Records dated January 15, 2009, and Holly Sawin dated March 20, 2009
Exhibit No. 12	DDES records for code enforcement case no. E0101050
Exhibit No. 13	Letter in support of the Appellant from Steven Beck to the Hearing Examiner dated February 21, 2009
Exhibit No. 14	Duplicates of Exhibits 6B and 7A-C
Exhibit No. 15	Letters in support of Appellant from his neighbors Robert and Kim Stephens and Steve McBride
Exhibit No. 16	Duplicate Exhibit 5 and letter from DDES Records to Appellant dated January 29, 2009
Exhibit No. 17	Receipts showing money spent by Appellant for disposal of refuse on subject property
Exhibit No. 18	Receipts showing money spent by Appellant to re-plant subject property
Exhibit No. 19	Receipt from Kleensweep Construction, Inc. for subject property cleanup
Exhibit No. 20	Photographs taken by Appellant depicting condition of subject property prior to cleanup

PTD:gao
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